Filed 2/10/04

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,	H022070
Plaintiff and Respondent,	(Santa Clara County Superior Court
v.	No. C9767100)
SADRUDIN LAIWALA,	
Defendant and Appellant.	
_____/	

Defendant was granted probation after the court convicted him in a court trial of grand theft of a trade secret in violation of Penal Code section 499c. On appeal, he challenges the sufficiency of the evidence to support the conviction. We find that the record contains insufficient evidence that information taken by defendant qualified as a trade secret under Penal Code section 499c. Thus, we must reverse his conviction.

I. Evidence

Defendant was an engineer who was hired by Hyundai Electronics America (HEA) in August 1994. Defendant's expertise involves a type of digital video called MPEG (Motion Picture Experts Group) which is used in DVD (digital video disk or digital versatile disk) applications. When defendant commenced his employment with HEA, he agreed to return any computer programs or documents or copies thereof upon the termination of his employment. Defendant subsequently began working for an

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HEA division called Odeum Microsystems. Odeum's business was making hardware and decoder chips for digital video applications. Defendant's job was developing software for "boards" that "support" "MPEG chip sets."

In early 1997, Odeum purchased a license to use a "master key" associated with the then newly created Content Scramble System (CSS), which had been created to serve as a form of copy protection for DVD content. Odeum hoped to use the master key to produce software and a chip that it could sell to DVD drive manufacturers. Odeum's CSS master key license did not provide it with a "disk key," a "title key" or the descrambling algorithm associated with CSS. The unique master key licensed to Odeum was one of about 400 master keys that the licensor had created for use in the CSS system. Odeum's master key consisted of a series of five "hexadecimal" or base sixteen numbers. The licensor of CSS had a mechanism available to deactivate a master key, but this mechanism, which would change the information encoded on each newly manufactured DVD, could affect only the ability of a DVD drive based on a deactivated master key to play newly manufactured DVDs. The CSS master key licensing agreement required Odeum to maintain the confidentiality of the master key and contained a $1,000,000.00 per breach liquidated damages clause.

CSS is a copy protection scheme used to encode and decode scrambled DVDs. CSS licenses first became available in December 1996 or January 1997. The availability of the CSS copy protection scheme led to a large increase in the number of movies released on DVD because it provided the content providers with some level of protection against digital piracy. CSS functions by using four encrypted "keys" to protect the data on the disk from unauthorized descrambling. These keys are a master key, a disk key, a bus key and a title key. A master key is used to "access and derive" some of the other keys that are necessary to "ultimately descramble" the disk's data content. The disk key resides in the disk drive. Disk keys are licensed to DVD disk drive manufacturers. The bus key protects the other keys from disclosure when those

other keys are being transmitted from one device to another within the system. The bus key is derived algorithmically during the process of authentication involving the master key. The title key or title keys reside on the DVD itself and are used to activate the CSS descrambling algorithm.

"The master key is part of the overall CSS system. If one had only the master key, it's only a part of the system, so it's, in itself, it's not sufficient to enable piracy. But it is certainly a key component." A pirate would need not only a master key but also the descrambling algorithm. "The master key is just one part of the overall copy protection system. You need to use the other elements as well. . . . So that there's an entire system of keys and logarithms and the sequence for using these things that must be implemented completely and correctly, otherwise no part of the system works." Essentially, the master key is integral to the "first step" of the CSS process but does not enable the descrambling of scrambled content on a DVD.

Each Odeum employee who required access to the CSS material, including the master key, was asked to sign a nondisclosure agreement, and access was limited to no more than six Odeum employees under the CSS licensing agreement. Defendant did not sign such an agreement because his work did not require him to have knowledge of the CSS information. Defendant was on the "systems software team" and was working on some drivers and utilities and other software related to the "DVD player project," but he was "not directly involved in the DVD player software" nor was he working closely with any other Odeum employees who were working on the CSS portion of the DVD player project. Consequently, defendant was never informed of or shown a copy of the CSS license agreement, and he was not considered authorized to have access to the CSS information.

Defendant's Odeum coworker, Madhukar Tallam, was required to sign a CSS nondisclosure agreement because his work necessitated access to the CSS information. At the end of March or the beginning of April 1997, Tallam completed the

"authentication program" that he had been working on involving CSS. Tallam's

authentication program contained the CSS master key licensed to Odeum. It also

contained "certain algorithms for manipulating and encrypting keys." Tallam's

program did not contain any of the algorithms necessary to descramble the information

on a DVD, nor did it contain the title key or any information related to the disk key.

Thus, while Tallam's program could be used to read the *scrambled* data on a DVD, it

provided no information that would assist in *descrambling* that data. Without the CSS

descrambling algorithm, "it would be challenging for someone" to pirate a DVD. It

was not necessary to use Tallam's program to read the scrambled data on a DVD,

because the scrambled data could be read without a master key. The limited purpose

of Tallam's program was "to get the final key that was used to decrypt the title."

Tallam's program resided on his local computer in Odeum's offices, and the

program was not available on Odeum's server. This was the only copy of the program

except for possibly a backup copy locked in Tallam's desk.[1] Tallam's computer was

not password protected or physically locked, and he kept the power on at all times.

Tallam took no additional precautions to protect Odeum's master key because he did

not believe that it was his responsibility to maintain the security of this information.

Odeum's offices were in a secure facility with access limited to employees and

escorted visitors.[2] The original CSS documentation, including Odeum's master key,

was kept in a locked desk in Odeum's offices. Odeum's general security measures

were comparable to those used by other "high tech" companies in the Silicon Valley to

protect their proprietary information. Odeum's limitation of access to the CSS

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[1] Some testimony suggested that a copy of the program had been "on the lab
computer" where the software was being tested, but it was fairly clear that the copy on
the "lab computer" was not a source code version of the program in which the master
key could be discerned.
[2] Odeum apparently had a policy that its employees were not to work at home, but this
policy was not strictly enforced.

information to just six employees was a stricter than usual means of securing such information.

Defendant often worked long hours late at night in Odeum's offices. On March 31, 1997, defendant gave written notice to Odeum that he was resigning effective April 11, 1997. At 9:02 p.m. on April 9, 1997, a printout was made of Tallam's program from Tallam's computer. Tallam was in San Francisco at the time the printout was made, and defendant was the only Odeum employee present in Odeum's offices at that time.[3] Tallam had not logged off his computer or turned it off before leaving Odeum's offices prior to this printout being made. Less than half an hour after the printout was made, a directory called "copyprot" was created on defendant's local computer at Odeum's offices. This directory contained a file called "dvdsad.zip" that was modified about an hour after the creation of the "copyprot" directory. This "dvdsad.zip" file contained a copy of Tallam's program including Odeum's master key. Defendant left Odeum's offices a little later at about 10:30 p.m.

On April 10, when Tallam arrived at work, he found a copy of the printout of his program on his desk opened to the page displaying Odeum's master key. Tallam immediately informed his boss, David Kocsis, of this discovery. On April 11, defendant and Kocsis attended a presentation at a conference during which defendant posed a couple of questions about DVD copy protection. Kocsis was surprised by defendant's questions because defendant had never previously displayed any interest in DVD copy protection.

Defendant's access to Odeum's offices was terminated on either April 10 or April 11. Defendant was told that he "didn't need to come in over the weekend since he was resigning." Nevertheless, defendant unsuccessfully attempted to access

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[3] Employees of other companies that shared the building with Odeum were present, but no one outside of Odeum was aware of Tallam's program.

Odeum's offices over the weekend of April 12 and 13. At defendant's April 14 Odeum exit interview, he declined to sign a form that stated he had had access to CSS because he said he had not had access to any CSS information. Defendant was not permitted access to the personal effects that he had left at Odeum; instead, Kocsis and another Odeum employee gathered defendant's personal effects and placed them in a box for him.

On June 19, 1997, defendant's residence was searched, and a bound copy of a printout of several computer files related to DVD copy protection, including Tallam's program, was found in a pile of other documents. On the front of the printout was handwritten "DVD Copy Protection [¶] Odeum Microsystems." This printout contained Odeum's master key. A floppy disk was inside the bound printout. This floppy disk contained the same "dvdsad.zip" file that had been found on defendant's computer at Odeum's offices and that contained Tallam's program, including Odeum's master key.

John McMullen, an investigator for the District Attorney's office, interviewed defendant on the day his home was searched. Defendant told McMullen that he had not worked on Tallam's program but that Tallam had shown him the source code and asked for his advice on it. Defendant acknowledged that he had not signed a CSS "paper," and he claimed that he had never had Tallam's program on his computer. However, he noted that he had seen a printout of the program.

Odeum reported the apparent security breach to the CSS licensor, but the licensor did not deactivate Odeum's master key. Odeum's failure to ensure the secrecy of the master key was a breach of the CSS licensing agreement. However, the licensor took no action against Odeum during the three years between the reported breach and the trial of this action. In the fall of 1997, Odeum abandoned the DVD project for which Tallam's program had been written, and Odeum's assets, with the

exclusion of the CSS information, were sold to another company. Neither Tallam's program nor Odeum's master key was ever used by anyone outside of Odeum.

II. Procedural Background

Defendant was charged by information with theft of a trade secret in violation of Penal Code section 499c. The information specifically alleged that defendant "with the intent to deprive and withhold from the owner thereof the control of a trade secret, and with the intent to appropriate said trade secret to his use or the use of another, did take, steal, carry away, and use without authority a trade secret, to wit, a copy protection system for DVD COPY PROTECTION SYSTEM, the property of Odeum Microsystems, Inc." The information also contained an enhancement allegation that alleged that defendant had taken, damaged or destroyed property resulting in a loss of more than $1,000,000.00.

The parties agreed to a court trial on the condition that a conviction would not result in a state prison term. The defense presented expert testimony at trial that a master key is "just a set of numbers" that "don't have any usefulness" and "really would have no value" to someone who lacked the CSS descrambling algorithm because the master key's only purpose was to authenticate a DVD disk to "prove that it's a legitimate DVD disk." The defense expert also testified that the master key would have no value "in private industry" because the required CSS descrambler could be obtained only by licensing the CSS system, which could provide the licensee with a master key. A master key had no value other than the cost of the licensing fee.

The prosecutor argued that defendant had taken the master key "with [the] intent to use [it] to improve his own employee skills or with the specific intent . . . to negate the exclusive control of Odeum." The prosecutor also argued that defendant "took it . . . to deprive them of that exclusive control so he could use the master key to maybe create a hack, who knows. Perhaps a piracy, perhaps a commercial venture.

The uses are limitless." The defense argued that the master key lacked "independent economic value." It also argued that there was no evidence that defendant had intended to use the master key.

The court found defendant guilty and found the theft to be grand theft, but it found the enhancement allegation not true. Defendant was granted probation conditioned on service of a six-month jail term. He filed a timely notice of appeal.

III. Discussion

Defendant contends that his conviction is not supported by substantial evidence that the master key was a "trade secret" within the meaning of Penal Code section 499c.[4]

Our first task is to determine exactly what "trade secret" information defendant was found to have taken. The information charged defendant with the theft of "a copy protection system." The evidence at trial focused on the measures taken by Odeum to protect the secrecy of *its master key* and on the alleged value of that *master key*. While the prosecution could have argued that Tallam's program as a whole was the "copy protection system" that defendant was alleged to have stolen, the prosecution made no attempt to produce evidence at trial that Tallam's *program* derived any economic value *from its secrecy* outside of the fact that it contained Odeum's master key. This is particularly important since the evidence showed that portions of Tallam's program that did not contain the master key had been openly disclosed to numerous Odeum employees including defendant. Hence, in determining whether the prosecution produced substantial evidence that the subject of the alleged theft was a trade secret,

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[4] He also asserts that the record lacks substantial evidence that he harbored the requisite specific intent. Since we find insufficient evidence that the master key was a trade secret, we do not address his challenge to the sufficiency of the evidence of intent.

we must restrict our review to the question of whether Odeum's *master key* constituted a trade secret.

"Every person is guilty of theft who, with intent to deprive or withhold the control of a trade secret from its owner, or with an intent to appropriate a trade secret to his or her own use or to the use of another, . . . [s]teals, takes, carries away, or uses without authorization, a trade secret." (Pen. Code, § 499c, subd. (b).) "'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (A) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Pen. Code, § 499c, subd. (a)(9).)

We are concerned here solely with part (A) of the statutory definition of a "trade secret" that is set forth in Penal Code section 499c, subdivision (a)(9). We will hereafter refer to this as "part (A)" or the "independent economic value" factor. Although no published case has yet construed the language of the "independent economic value" factor in Penal Code section 499c (which was added to the statute in 1996), the identical language has appeared in California's Uniform Trade Secrets Act since 1985 as part of the definition of a trade secret (Civ. Code, § 3426.1, subd. (d)(1)) and has been generally interpreted to require "that the secrecy of this information provides a business with a 'substantial business advantage.'" (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522.)

We apply settled rules of statutory construction in construing Penal Code section 499c's "independent economic value" factor. "When construing a statute, we must ascertain the intent of the Legislature so as to effectuate the purpose of the law. [W]e begin with the words of a statute and give these words their ordinary meaning. If the statutory language is clear and unambiguous, then we need go no further. If,

however, the language supports more than one reasonable construction, we may consider a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. Using these extrinsic aids, we select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212, citations and internal quotation marks omitted.) "Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.)

The language of the "independent economic value" factor contains two ambiguities. Information may qualify as a trade secret under part (A) only if it "[d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use." The first ambiguity is whether "who can obtain economic value from its disclosure or use" qualifies only "other persons" or qualifies both "the public" and "other persons." While the language of part (A) is facially susceptible of an interpretation that qualifies *both* "the public" *and* "other persons" with the clause "who can obtain economic value from its disclosure or use," such a construction must be rejected because it would render superfluous the words "the public or to." Part (A)'s distinction between "the public" and "other persons" must be given meaning, and the only possible meaning it could have is to distinguish between the general public, who

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may be able to utilize *non-technical* information, and competitors in the industry, who may have the ability to utilize *technical* information.[5]

A particular piece of technical or non-technical information may be "not . . . generally known" to "the public" even though the information *is* "generally known" within an industry and therefore "generally known" to competitors. Obviously, such information could not constitute a trade secret since it would not provide its owner with any competitive advantage. Similarly, if a particular piece of non-technical information is generally known to the public, it is not possible that this same non-technical information could be *not* "generally known" to competitors. Again, such information could not possibly qualify as a trade secret since no competitive advantage would exist for the trade secret holder. Thus, an interpretation qualifying *both* "the public" and "other persons" with the clause "who can obtain economic value from its disclosure or use" would deprive the words "the public or to" of any meaning. It follows that we must adopt a construction that applies that clause only to "other persons" and not also to "the public" in order to avoid rendering a portion of the language of part (A) superfluous.

The second ambiguity is that the language of part (A) could be construed to require that the information derive independent economic value from "not being generally known to" *both* "the public" *and* "other persons who can obtain economic value from its disclosure or use" or, alternatively, it could be construed to require only that the information derive independent economic value from not being generally known to *one **or the other** of these two groups.* Because this aspect of the language of

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[5] We use the term "non-technical information" here to refer to information that members of the general public are capable of utilizing. In contrast, we use the term "technical information" to refer to specialized information that the public is not capable of utilizing.

part (A) is ambiguous and can only be resolved by learning the Legislature's intent, we turn to the legislative history of the statute.

In this case, we are fortunate to have an express statement by the Legislature of its intent regarding the definition of trade secret in Civil Code section 3426.1, from which Penal Code section 499c was derived. The following comment makes it clear that the Legislature intended that information qualify as a trade secret only if it derives independent economic value from not being generally known to the public *and* "other persons who can obtain economic value from its disclosure or use." "The language 'not being generally known to the public or to other persons' does not require that information be generally known to the public for trade secret rights to be lost. If the principal person who can obtain economic benefit from information is aware of it, there is no trade secret. A method of casting metal, for example, may be unknown to the general public but readily known within the foundry industry. [¶] The phrase 'and not being readily ascertainable by proper means by' was included in this section as originally proposed by the National Conference of Commissioners on Uniform State Laws. It was removed from the section in favor of the phrase 'the public or to.' This change was made because the original language was viewed as ambiguous in the definition of a trade secret. However, the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation."[6] (Sen. Leg. Comm. Comment to Civ. Code, § 3426.1.)

Interestingly, though the California Legislature chose to modify the language of the Uniform Trade Secrets Act in this regard, the first paragraph of this comment

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[6] These comments appear in a "Report of Senate Committee on Judiciary on Assembly Bill 501." "In order to indicate more fully its intent with respect to Assembly Bill 501, the Senate Committee on Judiciary makes the following report." "Except for the new comment set out below, the Comments of the National Conference with respect to the Act reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill 501."

adopted verbatim the Commissioners' Comment to the Uniform Trade Secret Act. The Uniform Trade Secrets Act (UTSA) defines a trade secret as "information . . . that . . . derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." It does not allow information to qualify as a trade secret if it derives economic value from not being generally known to the public if no one other than the trade secret holder can derive economic value from the disclosure or use of the information. And the California Legislature's comment reflects that the Legislature did not intend for its change in the language of part (A) to alter its meaning but instead intended only to avoid a perceived ambiguity in the UTSA's language.[7]

The remainder of the legislative history provides little additional information about the Legislature's intent. As originally introduced, the legislation mirrored the UTSA language. The bill was subsequently amended at the urging of the State Bar to replace the language ", and not being readily ascertainable by proper means by," with "the public or to."[8] The State Bar argued: "In order for there to be a trade secret under [the original language], information needs to be not generally known and not readily ascertainable by other persons 'who can obtain economic value from its disclosure or use'. This probably requires that the only persons qualified to test general knowledge or ready ascertainability are competitors. This would seem to be an undue limitation since general knowledge, even if by others than competitors, should disqualify the trade secret." The State Bar believed that the then-existing Penal Code section 499c

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[7] Ironically, the alteration of the language created precisely the ambiguity that we now confront.

[8] There is no typographical error in this sentence. The Legislature removed a comma and a space and the "and not . . . by," language and replaced it with "the public or to" without any commas.

definition of a trade secret was better because it required both that the information not be generally available to the public *and* that the information provide "one who uses it an advantage over competitors who do not know of or use it."[9] The Legislature was urged by other parties to amend the language to simply state that a trade secret was "information . . . that . . . derives independent economic value, actual or potential, from not being generally known" and to delete the remainder of the proposed language, but the Legislature rejected these proposals.

Based on the Legislature's express statement of its intent and the legislative history, we are persuaded that the Legislature intended to define a trade secret in such a way that information would qualify as a trade secret only if it derived independent economic value from both not being generally known to the public and not being generally known to those who can obtain economic value from its disclosure or use. Furthermore, to the extent that the alternative constructions of the ambiguous language of the "independent economic value" factor are equally reasonable, we must construe this criminal statute in defendant's favor in accord with the rule of lenity. "When language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute." (*People v. Overstreet* (1986) 42 Cal.3d 891, 896.)

Consequently, we construe Penal Code section 499c to require proof that the master key derived actual or potential "independent economic value" from "not being generally known to other persons who can obtain economic value from its disclosure or use." On this element, the prosecution's proof was lacking. Odeum was required

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[9] The State Bar wrote to the Governor supporting the amended bill and expressing the belief that it adhered more closely to the definition in Penal Code section 499c.

by the master key license agreement to maintain the secrecy of the master key. If Odeum failed to maintain the secrecy of the master key, the licensor had the power and right to deactivate the master key. Deactivation of the master key would destroy any value that Odeum derived from the master key license. Since Odeum had paid a sum of money for the master key license, and the deactivation of the master key would negate the master key's value to Odeum, the secrecy of the master key was of at least potential economic value to Odeum.

However, there was no evidence that the master key derived "independent economic value" from not being generally known to "other persons *who can obtain economic value from its disclosure or use*" because there was no evidence or basis for an inference that anyone other than Odeum could have obtained economic value from the use of Odeum's master key, and disclosure of the master key would have destroyed any value that it held for anyone. The evidence presented at trial established that piracy would be impossible without the descrambling algorithm or some of the other keys. Indeed, the Attorney General concedes that there was no evidence presented at trial that anyone had the means to put the master key *by itself* to use as a means to pirate DVD content. Instead, the Attorney General asserts that the master key was of potential value to persons who were able to acquire the descrambling algorithm or other CSS keys so that they could pirate DVD content. No evidence was presented at trial that any such persons existed. Nor was there any evidence at trial that the master key had any other economic value outside of piracy. No competitor of Odeum would have based a product on a purloined master key because, as soon as the licensor learned of the loss of secrecy of the master key, the licensor could deactivate that master key thereby dooming any product based thereon. And any competitor could readily obtain a master key from the licensor for what was, in comparison to the cost of developing a product, a mere pittance.

On the record before us, the prosecution failed to produce substantial evidence that anyone other than Odeum could have obtained economic value from the disclosure or use of the master key. Accordingly, the evidence is not sufficient to prove the "independent economic value" factor of the offense of theft of a trade secret.

We asked the parties to submit supplemental briefing addressing the question of whether it would be appropriate for us to reduce defendant's conviction to *attempted* theft of a trade secret. The Attorney General asserts that it would be appropriate to reduce the conviction to an attempt, while defendant argues that it would be improper to reduce the conviction to an attempt. Having considered their arguments carefully, we conclude that it would not be appropriate in this case to reduce defendant's conviction to an attempted theft of a trade secret.

"Where a reviewing court finds insufficient evidence that a defendant committed the crime of which he was convicted but finds overwhelming evidence that he committed a *lesser included offense*, the court is empowered to reduce the conviction to the lesser offense." (*People v. Allen* (1985) 165 Cal.App.3d 616, 627, emphasis added; *People v. Enriquez* (1967) 65 Cal.2d 746, 749.) A person is guilty of a criminal attempt if he or she "attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration." (Pen. Code, § 664.) "An attempt to commit a crime consists of *two elements*: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (Pen. Code, § 21a, emphasis added.) The question here is whether the statutorily defined intent element of the offense of theft of a trade secret *necessarily includes* the specific intent element of attempted theft of a trade secret.

The intent element of the substantive crime of theft of a trade secret is satisfied by a finding that the perpetrator acted "with intent to deprive or withhold the control of a trade secret from its owner, or with an intent to appropriate a trade secret to his or her own use or to the use of another . . . ." Neither the intent to deprive nor the intent

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to appropriate necessarily encompasses a finding that the perpetrator *knew or believed* that the object of the theft was *in fact a trade secret*. One may take information with the intent to use it without entertaining any belief about whether the information is actually a trade secret. Attempted theft of a trade secret requires proof that the perpetrator specifically intended to take information *believing that the information was a trade secret*. Were this not true, someone who took information without any knowledge that it was a trade secret would be guilty of attempted theft of a trade secret. As the intent element of theft of a trade secret does not necessarily include this specific intent element of attempted theft of a trade secret, the lesser offense is *not* necessarily included in the greater offense.

The Attorney General relies on *People v. Rojas* (1961) 55 Cal.2d 252 in which receiving stolen property convictions were reduced to attempted receipt of stolen property because the property was not in fact stolen property. *Rojas* is distinguishable. In *Rojas*, the defendants indisputably had "the specific intent to commit the substantive offense and . . . under the circumstances as the defendants reasonably saw them they did the acts necessary to consummate the substantive offense; but because of circumstances unknown to defendants, essential elements of the substantive crime were lacking." (*Rojas* at p. 257.) Because an element of receiving stolen property was knowledge that the property was stolen, the verdict of guilt on that offense necessarily included a finding that defendants believed the property was stolen. Consequently, the specific intent element of attempted receipt **was** necessarily included in the greater offense.

In contrast, as the crime of theft of a trade secret does not include a knowledge element, the trial court's verdict here did not necessarily include a finding that defendant had the specific intent to steal information that he believed was a trade secret. Where a lesser offense is not necessarily included in a greater offense, it is not

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appropriate to reduce the greater to the lesser. Hence, we decline to reduce defendant's conviction to attempted theft of a trade secret.

IV. Disposition

The judgment is reversed due to the insufficiency of the evidence. The trial court is directed to enter a verdict of not guilty.

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Mihara, J.

I CONCUR:

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Bamattre-Manoukian, J.

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RUSHING, P.J., Concurring

I concur in the judgment and completely agree that the record is insufficient to support Mr. Laiwala's convictions of Penal Code section 499c, theft of trade secrets. I also agree that he is not guilty of attempted theft of a trade secret.

I do not agree that Penal Code section 499c is ambiguous. Under the facts presented in this case not only is the discussion irrelevant it resolves issues not raised by the parties. The widely followed definition of independent economic value that it confer a substantial business advantage is all that is required to resolve this case.

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RUSHING, P.J.

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Trial Court:	Santa Clara County Superior Court

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Trial Judge: Honorable Alden Danner

Attorneys for Appellant: Thomas J. Nolan
                          Daniel L. Barton
                          Cindy A. Diamond

Attorneys for Respondent: Bill Lockyer
                          Attorney General

                          Robert R. Anderson
                          Chief Assistant Attorney General

                          Ronald A. Bass
                          Senior Assistant Attorney General

                          Gerald A. Engler
                          Supervising Deputy Attorney General

                          George F. Hindall III
                          Deputy Attorney General

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